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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 460

JOSEPH MONTANARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph Montanaro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case June 22, 1966.

Opinion Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered June 22, 1966 (Appendix hereto, *infra*). The time for filing this

petition for certiorari has been extended to and including August 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

Petitioner was convicted of assaulting two Federal officers while they were arresting him on a warrant for failure to purchase a gambler's tax stamp. The questions are:

1. In a prosecution for assaulting Federal officers in violation of 18 U.S.C. § 111, is it a denial of fair trial and due process of law to instruct the jury that the Government need not prove that the defendant knew the persons allegedly assaulted were Federal officers? Can conviction in such a case without requiring proof of scienter of the Federal character of the officers be reconciled with traditional doctrines of criminal intent as an element of the crime to be charged and proved beyond a reasonable doubt?

2. Should certiorari be granted as to question No. 1 to resolve an indicated conflict or at least a doctrinal disunity among Circuits?

3. In view of the granting of certiorari in *Costello* v. *United States*, 383 U. S. 942 (No. 826, Oct. Term, 1965), should certiorari be granted here for the reason that, if *Costello* should result in invalidation of the Federal wagering tax laws on which the warrant of arrest in our case was based, the assertion of Federal authority in our case would have lacked constitutional foundation and no constitutional jurisdiction would exist for having applied the assault statute (18 U.S.C. § 111) to petitioner?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment of the United States Constitution (due process of law), and 18 U.S.C. § 111. The latter statute reads:

> "§ 111. Assaulting, resisting, or impeding certain officers or employees
>
> Whoever forcibly assaults, resists, opposes, impedes, intimidates or interfers with any person designated in section 1114 of this title while engaged in or an account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 688."

Statement of the Case

1. Introductory

Petitioner was convicted (40a)* in the United States District Court for the Eastern District of New York (Mishler, D.J.), after a jury trial, under two substantive counts of assaulting Federal officers in violation of 18 U.S.C. § 111, and was sentenced to one year and one day on each count, to run concurrently, plus a committed fine of $1,250.00 on each count. The conviction was affirmed by the United States Court of Appeals for the Second Circuit (Appendix hereto, *infra*). Petitioner is free on bail pending this petition for certiorari.

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*" a" refers to the appellant's printed appendix in the Court below. We have not printed an appendix of testimony. The Government printed an appendix of some testimony but we shall refer to the typewritten stenographic minutes, as "Tr. ".

The indictment (6a) alleged an assault, etc. by the defendant on October 3, 1963 in the County of Kings against two Special Agents of the Intelligence Division of the Internal Revenue Service while in performance of their official duties; Count One alleged assault against Special Agent John Foy, Count Two alleged the same with respect to Special Agent Peter J. Bellon.

2. Synopsis of the Trial Proofs

The Government's theory of the case is that on the date mentioned in the indictment several Treasury Agents had set up a street interception to arrest the defendant on a charge of failure to purchase a $50 Federal gambler's tax stamp; that the defendant, traveling in an auto with two other men, was intercepted as planned, the agents setting up a roadblock with their cars as the defendant approached; that Agent Foy walked up to the defendant's stopped car announcing that he was a Federal agent and had a warrant, whereupon the defendant put his car in motion and injured Agents Foy and Bellon by squeezing them against the surrounding Government vehicles;* and that the defendant stopped his car again when another agent ran up and put a gun to his head (Tr. 2-13, 16-19, 21-27, 120-128, 139-145, 168-172, 175, 261-262, 265-268, 270, 292, 296-298, 307-308, 334-336, 391-397, 477-480).

The defense unqualifiedly took the position throughout the trial, from the time of defense counsel's opening statement to the Jury, that the Government's case was on outright fabrication, done in a vindictive spirit because of the failure to find any "bookie" slips on the defendant or in his car. The defendant took the stand, as did also a passenger in his car. The defendant swore, and his passenger in substance confirmed, that when he saw the cars ahead of him suddenly moving away from the curb to converge at

* Neither Agent was seriously injured (Tr. 21-22, 127-128, 139-142, 348-349, 372-373).

the center line of the street, he thought he was coming into a vehicle accident situation, he slammed on his brakes, several men who he feared might be trying to stick him up or "hit"* him (and of whose identify as Federal agents he was unaware) pounced at his car and dragged him and his passengers out of the car, the car was evidently still in gear and it began to move forward after the defendant was dragged from the driver's seat, and subsequently the Treasury agents told the defendant that the failure to find gambling evidence would not do him any good because they were going to get him off the street for five years on assault charges (Tr. 536-540, 637-641).

3. The Issues of Law in the Courts Below

By motion at the end of the Government's direct case and at the end of the entire case the defense reserved the contention—which, we realized, faced the obstacle of the Second Circuit's then recent decision in *United States* v. *Lombardozzi*, 335 F. 2d 414 (C. A. 2, 1964), cert. denied 379 U. S. 914—that we were entitled to acquittal unless the Government proved scienter of the Federal official character of the two men allegedly assaulted (Tr. 501-505, 804). The Trial Judge, who had himself a short time previously ruled in favor of this same contention in another case (*United States* v. *Bell*, 219 F. Supp. 260 (E.D.N.Y. 1963) and expressed his sympathy with our contention, deemed himself bound by the *Lombardozzi* decision (Tr. 501-505), and he instructed the jury that "the Government need not prove that this defendant knew that these agents were Federal agents" (24a).

The Court of Appeals, in affirming the conviction, adhered to its *Lombardozzi* decision, *supra* (Appendix hereto *infra*).

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* "Hit" has the vernacular meaning of a killing or a severe beating.

The Court of Appeals (*ibid*) also found no merit in our contention which we based on the granting of certiorari in *Costello v. United States,* 383 U. S. 942 (No. 826, Oct. Term, 1965); see our Question Presented no. 3, *supra.*

Reasons for Granting the Writ

I.

Certiorari should be granted to resolve the important due process issue of the non-scienter rule of cases like *United States* v. *Lombardozzi, supra,* in prosecutions for assaults on Federal officers (18 U.S.C. § 111). The issue of intent or willfullness in the most comprehensive sense is, or should be, cardinal in prosecutions under 18 U.S.C. § 111, but that issue is *pro tanto* obliterated by the *Lombardozzi* rule.

The basic line of reasoning in *Lombardozzi* was that, notwithstanding earlier impressive (indeed overwhelming) authority to the contrary, 18 U.S.C. § 111 should be construed as not requiring scienter of the Federal official character of the assaulted person because (1) the Fifth Circuit in *Bennett* v. *United States,* 285 F. 2d 567 (C.A. 5 1960), cert. denied 366 U. S. 911, had departed from the earlier precedents on the basis of reasoning that the statute does not expressly require such scienter, and (2) many criminal statutes do contain such terms as "knowingly", "intentionally" etc. and Congress could easily have written such a requirement into § 111.

In view of the Second Circuit's evidently strong reliance in *Lombardozzi* on the Fifth Circuit's decision in *Bennett* v. *United States, supra,* and since *Bennett* marks, as it were, the contemporary turning point in the case law on this subject, it seems appropriate to take a closer look at *Bennett.*

In the first place, it is noteworthy that *Bennett* did not cite any of the earlier Fifth Circuit decisions which had

ruled to the opposite effect—i.e., *Hargett* v. *United States*, 183 F. 2d 859 (C.A. 5 1950); *Hall* v. *United States*, 235 F. 2d 248 (C.A. 5 1956); *Carter* v. *United States*, 231 F. 2d 232 (C.A. 5 1956).

Hargett, supra, was the Fifth Circuit case which may be said to have founded the pro-scienter rule in that Circuit insofar as the more modern decisional period is concerned; *Hargett* cited earlier Fifth Circuit cases to the same effect, and it reviewed the nation-wide authorities (183 F. 2d at 863-865). The Bench in Hargett consisted of Circuit Judges Holmes, Waller and Borah, the decision being written by Judge Waller.

The *Carter* case in the Fifth Circuit, *supra*, appears to have taken it for granted that the rule laid down in *Hargett* was the law, although citing no authority; *Hargett* was cited in *Carter*, but only for another point (231 F. 2d at 235). The Bench in *Carter* consisted of Circuit Judges Borah, Tuttle and Brown, the opinion being by Judge Brown.

The Fifth Circuit decision in the *Hall* case, *supra*, cited only *Carter* for the rule requiring scienter. The Bench in *Hall* consisted of Circuit Judges Tuttle, Cameron and Jones, the opinion being *per curiam*.

We repeat, the most recent Fifth Circuit case—*Bennett*, which was so strongly relied upon in *Lombardozzi*—does not cite the earlier Fifth Circuit decisions in *Hargett*, *Carter* and *Hall*. The Bench in *Bennett* consisted of Circuit Judges Tuttle (Chief Judge), Jones and Brown, the opinion being by Chief Judge Tuttle.

Thus, Chief Judge Tuttle sat in the *Carter*, *Hall* and *Bennett* cases. Judge Brown sat in the *Carter* and *Bennett* cases; and Judge Jones sat in the *Hall* and *Bennett* cases. These alignments of the Fifth Circuit Judges in the *Carter*, *Hall* and *Bennett* cases are puzzling. We say puzzling, because, again, the *Bennett* case does not refer to any of the

earlier cases, even though all three of the Judges in *Bennett* had voted for the opposite rule—on the scienter issue—in the *Carter* or *Hall* cases. The answer to the puzzle may lie, however, in the fact that the Fifth Circuit in the *Carter* case—which was the next case after the comprehensive decision in *Hargett*—omitted to cite *Hargett* for the point in question, as above noted; nor was *Hargett thereafter* cited in the other Fifth Circuit decision above mentioned. All of this scarcely favors the idea that the Fifth Circuit's sudden turnabout in the *Bennett* case was done on a thoroughly advised basis. In other words there is presented a far from ideal "judicial history" in the Fifth Circuit in support of the suggestion that the *Bennett* case "overruled" the *Hargett* case.

The question of just how authoritative or deliberate one is to regard the Fifth Circuit decision in *Bennett* as being, is rendered still more acute by the fact that *Bennett* not only omits any mention of the earlier decisions (as already pointed out), but it also omits mention of any authority for the anti-scienter rule except *McNabb* v. *United States,* 123 F. 2d 848 (C.C.A 6, 1941), reversed on other grounds 318 U. S. 332, rehearing denied 319 U. S. 784; see the *Bennett* decision at 285 F. 2d 571. *Hargett* had expressly distinguished the *McNabb* case on the ground that it involved a homicide (where scienter as to identity of the victim is not always necessary); and *Hargett* had also noted, in discussing *McNabb,* that "Moreover, the great weight of authority is against the Government's contention"; see the *Hargett* opinion at 183 F. 2d 864. Nevertheless, *Bennett,* in placing its sole reliance on *McNabb,* did not even take note of the previous rejection of *McNabb* in *Hargett.*

We therefore respectfully repeat that the Fifth Circuit decision in the *Bennett* case, which appears to have weighed importantly with Second Circuit in *Lombardozzi,* is not a strongly persuasive authority.

All of the foregoing—in which we have been speaking thus far primarily of the situation in the Fifth Circuit—needs to be considered, moreover, together with the decisional positions in other Circuits. It is true that in *Lombardozzi* the Second Circuit noted that the Fifth Circuit's *Hargett decision, supra,* had taken cognizance of the scienter-requirement rulings in *Pettibone* v. *United States,* 148 U.S. 197, and in decisions of the Fifth, Sixth, Seventh and Eighth Circuits holding that scienter was a necessary element of crimes against Federal officers. After so noting, however, the Court in *Lombardozzi* went on in its next sentence to discuss the *Bennett* case as laying down a contrary rule, and the Court in *Lombardozzi* engaged in no further discussion of the numerous decisions opposed to *Bennett.* In view of the above suggested indications which seem to us to reflect questioningly on the authoritativeness of the *Bennett* decision, we asked the Court below in the instant case to turn its attention once again to the decisions favoring a scienter requirement, but it declined to do so (Appendix hereto, *infra*).

The most notable of those decisions is, of course, this Court's decision in the *Pettibone* case, *supra.* We must respectfully state that it seems difficult to understand the dilution of the authoritativeness of the *Pettibone* case that has come about in decisions like *Bennett* and *Lombardozzi. Lombardozzi* referred only to the *Pettibone* language at 148 U.S. 205 that, "[I]t is the official character that creates the offense, and the scienter is necessary". The entire language of Chief Justice Fuller in *Pettibone* on the point in question, deserves to be studied (148 U. S. at 204-210), and we respectfully request this Court to examine that discussion in *Pettibone.*

The discussion of the scienter problem in *Pettibone,* was in the larger framework (necessitated by fundamental due process standards, as the Court emphasized) of fair apprisal and fairly informative accusational requirements in

Federal criminal prosecutions. This broad-based treatment of the issue in *Pettibone* has been lost sight of in the most recent cases involving § 111 such as the *Bennett* and *Lombardozzi* cases. But it apparently has not been lost sight of by this Court, for as recently as *Russell* v. *United States,* 369 U. S. 749, 765-766, decided in 1962, the Court approvingly cited the *Pettibone* case, in an opinion by Mr. Justice Stewart, to invalidate indictments which were found defective for failure to make adequate indentification of the subject matter of the offenses charged.

As regards the other Federal decisions which have imposed the scienter requirement, the cases as of the time of the *Hargett* decision (1950) were collected in the latter decision at 183 F. 2d, pp. 864-865:

> "The Court of Appeals of the Fifth Circuit has construed scienter as a material ingredient of a statutory offense relating to obstruction of justice in Odom v. U. S., 116 F. 2d 996. See also: Palmquist v. U. S., 149 F. 2d 352; Gay v. U. S., 12 F. 2d 433; Moore v. U. S., 57 F. 2d 840; and Cook v. U. S., 117 F. 2d 374.
>
> The Sixth Circuit, the author of the McNabb case relied upon by the United States, held in Sparks v. U. S., 90 F. 2d 61, that scienter was necessary in violation of Title 18 U.S.C.A., § 254.
>
> The Seventh Circuit has held, in Chiaravalloti v. U. S., 60 F. 2d 192, that in a violation of Section 91 [now § 201] of Title 18, U.S.C.A., involving bribery of a Federal officer, scienter was necessary.
>
> The Eighth Circuit has held similarly in Walker v. U. S., 93 F. 2d 792.
>
> In U. S. v. Page, D. C., 277 F. 459, it was held (by the District Court, W. D. of Virginia) that an indictment under Section 65 of the Criminal Code [now 18 U.S.C.A. § 2231] for forcibly resisting an officer must allege that the accused knew the person assaulted was an officer.

> In a Circuit Court case, U. S. v. Taylor, C. C., 57 F. 391, 393, involving the obstruction of Federal officers, the court said: 'To assault an officer of the United States while happening to be engaged in performing some duty enjoined upon him by federal statute is only a common-law offense; and it becomes a statutory offense only when the assailant knows that the assailed is an officer of the United States, and makes the assault for the purpose of obstructing the officer in the discharge of duty imposed by laws of the United States. In such cases the scienter is an essential ingredient of the offense.'
>
> In 39 Amer. Jur., Obstructing Justice, § 13, this language is used: '* ** If an officer does not disclose his authority and the accused does not know that he is an officer and is attempting to arrest him for an offense, he has a right to resist the arrest with whatever force is necessary'."

After *Hargett* and its collection of the authorities as of that time, the next case to be noted (outside the Fifth Circuit*) is *Portnoy* v. *United States,* 316 F. 2d 486, 487-488 (C. A. 1 1963), which expressly left open the scienter issue —i.e., the Court found it unnecessary to reach the issue because it found that the indictment involved had in effect sufficiently met the scienter requirement; *Portnoy,* incidentally, noted that the appellant had called attention (as we have done, *supra*) to the questionable authority of the Fifth Circuit decision in *Bennett* in that *Bennett* had failed to mention the Fifth Circuit prior rulings to the contrary.

Similiar to the *Portnoy* case disposition of the scienter question was the Second Circuit's decision in *United States* v. *Burgos,* 328 F. 2d 109 (C. A. 2 1964), which shortly pre-

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* The post-*Hargett* cases in the Fifth Circuit have already been discussed, *supra.*

ceded *Lombardozzi*, and where the Court noted the conflicts between the *Bennett* case and the earlier decisions, the disposition in *Burgos* being that the scienter issue need not be reached because the Trial Court had explicitly found scienter; *Burgos* cited *Portnoy* for this.*

Of greater interest, however, is that in a decision handed down subsequent to *Lombardozzi*, the Fourth Circuit, which had not previously spoken on the scienter question here involved, evidently chose to at least leave the question open, i.e., the Fourth Circuit evidently did not adopt the *Lombardozzi* rule. We refer to *United States* v. *Chunn*, 347 F. 2d 717, 721-722 (C. A. 4 1965), which left open the scienter issue as such, disposing of the case on a basis closely similar to that which was dispositive in *Portnoy* and *Burgos, supra;* the opinion in *Chunn* (347 F. 2d at 721-722), shows that the Court was exhaustively aware of the status of the Federal case law on this subject.

It is of interest also that in *Taylor* v. *United States*, 334 F. 2d 386, 387-388 (C. A. 10 1964), decided a little less than one month prior to *Lombardozzi*, the Tenth Circuit dealt with the scienter question here involved for the first time, and it too, as did the Courts in *Portnoy, Burgos* and *Chunn, supra*, chose to leave the question open inasmuch as the particular indictment was deemed sufficient to allege scienter in any event. The *Taylor* opinion was written with full awareness of the state of the Federal case law on the subject.

Fundamentally, any prosecution under a statute such as 18 U.S.C. § 111 must inevitably cope with the question of the defendant's intent in the most comprehensive sense. It is not enough to say that the intent under § 111 consists only of an intent to commit the assault (or battery) as

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* The panel in *Lombardozzi* was Circuit Judges Moore, Smith and Marshall; in *Burgos* it was Circuit Judges Clark, Smith and Hays (Judge Clark having died before the opinion was prepared).

such, irrespective of the defendant's knowledge of the idenitity or official character of the victim. Wilfullness in the fundamental sense of a specific criminal intent is an essential element under this statute. Such would be axiomatic in any Federal criminal prosecution not founded upon a sheer *"malum in se"* statute; and see *Mathes* and *Devitt, Federal Jury Practice and Instructions* (1965), § 20.05, pp. 201-202, specifically discussing 18 U.S.C. § 111.

We are respectfully emphasizing this element of wilfullness as a general but invariable requirement in prosecutions of the present type, because it seems to us that here, once again, there is presented a fundamental analytical difficulty in the reasoning of *Lombardozzi*. *Lombardozzi* did not take into account the requisite element of proof of what we may term basic wilfullness in prosecutions under § 111. Instead, *Lombardozzi* preferred a highly literal reading of the statute; it emphasized the omission from the statute of any express requirement of scienter of the official character of the assault victim; and it seems to have assimilated this latter omission from the express statutory words with the omission also from the statute of any such term as knowingly, intentionally, wilfully etc. But if, as we contend, the requirement of proof of wilfullness is *implicit* in prosecutions under § 111, does not the problem of scienter as to the official character of the assault victim necessarily emerge in a more insistent degree than the Court thought in *Lombardozzi*?

Our above suggestions as to the general but indispensable implicative incorporation in this statute of the wilfullness requirement are but another way of expressing the equally (or even more) basic due process requirements as to apprisal and specific accusation which were so decisive in this Court's thinking in *Pettibone* and *Russell, supra*.

Nor does the fundamental constitutional analysis of this question end with the due process formulation alone. What

of the question of Federal *jurisdiction*? In several of the authorities above noted, notably in *Pettibone*, the problem of Federal versus State criminal jurisdiction over assaults, etc., was not only recognized but was the subject of grave concern. Unless the scienter requirement which is in issue in this case is acknowledged, how can the Federal jurisdiction over what would otherwise be an area of traditional State criminal jurisdiction be constitutionally justified?

When these due process and Federal-State jurisdictional considerations are appreciated in their full combined impact upon the scienter problem here presented, is not one justified in requesting that decisions like *Lombardozzi* and *Bennett* be re-evaluated, especially in the interest of resolving the conflict or the doctrinal disunity among the Circuits on this subject? Or, at least, is not one justified in proposing that the latter decisions ought not to be simplistically applied to a case like ours where the basic issue of intent stands so strongly controverted in the trial record.

Finally, our scienter contention cannot be met solely by the fact that the indictment in this case uses the words that each agent was "engaged in *and on account* of his official duties" (6a-7a). The words "on account of", etc., which were mentioned in cases like *Portnoy, Burgos, Taylor* and *Chunn, supra*, as effectively constituting an indictment allegation of scienter of official character, do not meet our scienter issue. For our scienter issue does not lodge in the words of the indictment alone; it is addressed rather to the fact that the Trial Judge expressly instructed the Jury that the Government need not prove the official character or activity of the agents. Indeed, this last raises additional error in that if the indictment here does import a charge of scienter (by use of the words "on account of") it was error (1) to instruct the jury that such need not be proved, and (2) to allow the case to go to the jury, or to refuse to set aside the verdict, in view

of failure to prove the scienter thus said to be arguably charged in the indictment. Indeed further, since the words "on account of" come from § 111 itself, cases like *Portnoy, Chunn* etc., which hold an indictment sufficient in alleging scienter because of inclusion of those statutory words, necessarily mean that those statutory words in themselves import a requirement of scienter.

II.

The trial in our case terminated on December 6, 1965 (4a). Sentence was imposed January 21, 1966. On March 21, 1966 certiorari was granted in *Costello* v. *United States*, 383 U. S. 942, No. 826, limited to the following question:

> "1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in Albertson v. Subversive Activities Control Board, 382 U. S. 70, 15 L. ed. 2d 165, 86 S. Ct. 194 (1965), overrule United States v. Kahriger, 345 U. S. 22, 97 L. ed. 754, 73 S. Ct. 510 (1953) and Lewis v. United States, 348 U. S. 419, 99 L. ed. 475, 75 S. Ct. 415 (1955)?"

The granting of certiorari in *Costello* case evidently means that the Court is going to reconsider the constitutionality of the Federal wagering tax laws which were previously sustained in *United States* v. *Kahriger*, 345 U. S. 221 and *Lewis* v. *United States*, 348 U. S. 419.

The interception-arrest-roadblock operation which gave rise to the alleged happenings in our case was concededly prompted by the agents' having an arrest warrant for the defendant's alleged violation of the above mentioned wagering tax legislation.

What if that legislation is void on constitutional grounds —the issue which the Court has now taken up for a re-

newed consideration in the *Costello* case, *supra*? Would not the entire assertion of Federal authority against petitioner Montanaro on October 3, 1963 become washed out to a constitutional nullity if the ostensible "arrest warrant" turned out to have been a "process" in abortive "effectuation" of a constitutionally void Federal "statute"?

The portion of Chief Justice Fuller's discusion in *Pettibone* earlier referred to (148 U. S. at 204-210) emphasizes, *inter alia*, the requirement that asserted process for arrest, etc. in situations of the type here involved, must be "legal process"; *Pettibone* cited *United States* v. *Tinklepaugh*, 3 Blatchf. 425, *United States* v. *Stowell*, 2 Curt. C. C. 153, and *United States* v. *Wilcox*, 4 Blatchf. 391, for the rule that failure to aver or show that such process was "authorized" is fatal (see 148 U. S. at 206).

This case of ours, being on review in this Court from the judgment of conviction, remains in that still active litigational posture in which a supervening authoritative adjudication of constitutional nullification may be invoked by the person sought to be made subject to the penalties of such statute.

We therefore submit that certiorari should be granted in this case for consolidation with the pending certiorari proceedings in *Costello;* or in any event that our case be held under consideration for the granting of certiorari until final disposition of *Costello.*

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner
Joseph Montanaro

APPENDIX

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 423—September Term, 1965.

(Argued June 2, 1966 Decided June 22, 1966.)

Docket No. 30359

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH MONTANARO,

Defendant-Appellant.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeal from sentence of fine and imprisonment on conviction on two counts of violation of 18 U. S. C. § 111 on trial to the jury in the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge*. Affirmed.

RAYMOND BERNHARD GRUNEWALD, Asst. United States Attorney, Eastern District of New York (Joseph P. Hoey, United States Attorney, Eastern District of New York, on the brief), *for appellee.*

JEROME LEWIS, Brooklyn, New York, *for defendant-appellant.*

PER CURIAM:

Joseph Montanaro appeals from a conviction on two counts of assault upon federal officers in violation of 18 U. S. C. § 111, after trial by jury before Judge Mishler. He was sentenced to a year and a day, concurrent, on each count, and to a fine of $1250 on each count. We find no error and affirm the judgment.

Montanaro was stopped by Internal Revenue Agents while proceeding in his car in Brooklyn. The agents had a warrant for Montanaro's arrest for violation of federal gambling tax statutes. As Montanaro passed the agents, they used their cars to surround him, and apparently left a small aperture through which a car might have continued. The agents testified they were waving their badges as they approached. Montanaro said he saw no such thing and heard no claim of federal authority. His car hit Agent Foy and then Agent Bellon; neither agent was seriously injured. Montanaro claimed he had already been dragged from his car when the car's momentum carried it into the agents. On appeal we view the evidence in the light most favorable to the government, prevailing below. *United States* v. *Robbins,* 340 F. 2d 684 (2 Cir. 1965); *United States* v. *Kahaner,* 317 F. 2d 459 (2 Cir.), cert. denied 375 U. S. 836 (1963).

The District Court charged the jury that the government did not need to show that defendant knew the agents were federal agents. This was in accord with *United States* v. *Lombardozzi,* 335 F. 2d 414 (2 Cir.), cert. denied 379 U. S. 914 (1964). Appellant now asks that this doctrine be re-examined. We adhere to this recent, considered opinion. Compare *Kasle* v. *United States,* 233 Fed. 878, 882 (6 Cir. 1916); *United States* v. *Sherman,* 171 F. 2d 619 (2 Cir. 1948), cert. denied 337 U. S. 931.

We find no merit in appellant's contention that because the gambling tax statutes may in the future be held unconstitutional, the officers assaulted were not in the performance of their official duties. There is no claim that the warrants were not on their face valid, and correct in form, and the statutes had been upheld. *United States* v. *Kahriger,* 345 U. S. 22 (1953).

Nor does *Ladner* v. *United States,* 358 U. S. 169 (1957) aid appellant here. There was evidence from which the jury was entitled to find two successive assaults, first on Foy and then on Bellon. Cf. *Cameron* v. *United States,* 320 F. 2d 16 (5 Cir. 1963).

Judgment affirmed.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June, one thousand nine hundred and sixty-six.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH MONTANARO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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231-557—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 460

JOSEPH MONTANARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 18–19) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1966 (Pet. App. 17). On July 22, 1966 Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including August 19, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for assaulting federal agents in performance of their official duties in making an arrest, the court erred in instructing the jury that the government need not prove petitioner's knowledge that they were federal agents.

2. Whether the assault would be subject to punishment even if the federal wagering tax statute were subsequently declared unconstitutional.

STATUTE INVOLVED

18 U.S.C. 111 provides in pertinent part as follows:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 [listing certain federal officers, including Internal Revenue agents] of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> * * * * * *

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of New York on two counts of an indictment charging separate assaults on the same day against Internal Revenue agents engaged in their official duties, in violation of 18 U.S.C. 111 (App. I, 4a, 6a–7a, 38a–39a).[1] He was given concurrent sentences of imprisonment for one year and one day on each count and was sepa-

[1] "App. I" refers to Appellant's Appendix; "App. II," to Appellee's Appendix.

rately fined $1,250 on each count (App. I, 4a). On appeal the conviction was affirmed (App. I, 5a; Pet. App. 17).

1. The evidence showed that on the afternoon of October 3, 1963, Internal Revenue agents were seated in unmarked government cars on a Brooklyn street (App. II, 5a–6a, 24a–26a, 45a–46a, 64a–65a, 74a–75a), awaiting the arrival of petitioner, for whom they had a federal warrant of arrest for violation of the federal wagering tax statute (App. II, 10a, 39a, 44a, 71a). When the agents were alerted by radio that petitioner's Plymouth station wagon was approaching, they moved their cars into a triangular formation so that they blocked the path of his vehicle (App. II, 8a–12a, 22a–23a, 28a–30a, 66a–67a, 75a–76a). As agents Foy and Bellon approached petitioner's station wagon, they held their federal badges in the air so that petitioner could see them (App. II, 12a, 31a–32a). Agent Foy told petitioner he was a federal agent and started to inform him about the arrest warrant, when petitioner started moving his vehicle forward, which resulted in Foy being pinned next to his car so that his hips were crushed between the two cars (App. II, 12a–13a, 18a–19a, 38a, 49a–51a, 68a, 77a). Shortly afterward petitioner, in attempting to drive through an opening between two of the government vehicles, knocked down agent Bellon, who suffered an injury to his left hip (App. II, 13a, 33a–35a, 51a). When petitioner ignored the command of agent Namorato to stop, the agent pointed a gun at petitioner's head. Petitioner then stopped his vehicle, and was promptly arrested (App. II, 52a, 78a).

Petitioner testified on his own behalf that he thought the men were trying to rob him, and that he did not hear any of them say he was a federal agent with a warrant for petitioner's arrest (App. II, 81a). Petitioner denied that his car collided with either of the injured agents (App. II, 83a).

2. At the close of the government's case petitioner's counsel made a motion for dismissal of the indictment on the ground that it failed to allege that petitioner knew that the agents were federal officers engaged in official duties. Counsel stated that he was aware of the contrary ruling in *United States* v. *Lombardozzi,* 335 F. 2d 414 (C.A. 2). The court denied the motion (R. 501–505). In its final charge the court instructed, without objection by petitioner's counsel, as follows (App. I, 24a):

> Now, the Government need not prove that this defendant knew that these agents were federal agents. Of course, as Mr. Lewis (petitioner's counsel) pointed out in his summation, you may, of course, consider it in determining whether or not the Government proved that the acts which the Government charges were committed, were done wilfully.

ARGUMENT

1. Petitioner has demonstrated no sound reason for re-examination of the recent decisions of *United States* v. *Lombardozzi,* 335 F. 2d 414 (C.A. 2), certiorari denied, 379 U.S. 914, and *Bennett* v. *United States,* 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911, holding that in a prosecution under 18 U.S.C. 111, it is not necessary that the government

prove that the accused knew that the persons assaulted were federal agents. That this is the proper interpretation of 18 U.S.C. 111 is apparent from its clear language. The statute provides that whoever assaults, resists, etc., a federal officer in the performance of his official duties shall be punished; it does not require that the doer of the prohibited act shall have knowledge that the person assaulted is a federal officer.[2] Unjustified forcible assault can never be an innocent act; one who knowingly commits such an assault necessarily knows that he is committing a crime. Thus the interpretation of the statute adopted in the cases cited does not eliminate the element of intent. The question whether the person assaulted is or is not a federal officer does not go to the criminality of the act done; it goes to the question of which sovereignty shall try and punish the criminal act. It is entirely proper for the federal government to try a criminal assault upon its officer. One of the purposes of the statute was to make it unnecessary for the government to rely upon the courts of the States for the protection of its investigative and law enforcement personnel. S. Rep. No. 535, 73d Cong., 2d Sess.; H. Rep. No. 1455, 73d Cong., 2d Sess. It is the federal office of the person assaulted which properly gives federal jurisdiction over the crime.[3]

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[2] See *United States* v. *Lombardozzi*, *supra*, at 416.

[3] Petitioner's constitutional claim amounts to an assertion that, as a concomitant of due process, he has a right to know, prior to committing a criminal assault, whether a federal or a state court will have jurisdiction to try him. Calling this a "scienter" requirement (Pet. p. 6 *et seq.*) is quite misleading. In this case,

2. Despite petitioner's attempt to suggest otherwise, there is no conflict among the circuits.

In *Pettibone* v. *United States*, 148 U.S. 197, this Court, in holding that an indictment for conspiracy to obstruct justice in federal courts by violating an injunction must allege that defendants knew of the existence of a federal injunction, stated that an indictment against a person for corruptly endeavoring to influence or impede a witness or officer in a court of the United States in the discharge of his duty must charge notice on the part of the accused that the person sought to be influenced was indeed a witness or officer (148 U.S., at 206). At that time, there was no general statute punishing assaults upon federal officers. Aside from the obstruction of justice statute, federal law punished only resistance to specified officers in the discharge of their duties (18 U.S.C. (1934 ed.) 118, 33 Stat. 1265, 35 Stat. 1100). Resistance of officers in the performance of duty can plausibly be regarded as requiring knowledge of that duty.

In 1934, however, Congress enacted a statute (48 Stat. 780) providing (in Section 1, 18 U.S.C. (1934 ed.) 253) for punishment of anyone who killed any specified officer of the United States "while engaged in the performance of his official duties, or on account

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and all other cases under 18 U.S.C. 111, the government must prove the intentional commission of acts constituting the offense. Here the government proved beyond a reasonable doubt that petitioner committed an intentional assault. That the victims were federal officers is pertinent only as to jurisdiction.

of the performance of his official duties," and (in Section 2, 18 U.S.C. (1934 ed.) 254) for punishment of persons who "shall forcibly resist, oppose, impede, intimidate, or interfere" with such officer "while engaged in the performance of his official duties" or "shall assault him on account of the performance of his official duties." Prior to 1948, the Sixth Circuit held, in a prosecution under the assault provision (Section 2), that knowledge of the officer's status was an element of the offense. *Sparks* v. *United States,* 90 F. 2d 61. Later, however, without referring to *Sparks,* the same court held, in a prosecution under the killing provision (Section 1), that knowledge of the character of the victim's employment was not a necessary element of the offense. *McNabb* v. *United States,* 123 F. 2d 848, reversed on other grounds, 318 U.S. 332. Under the wording of the statutes then in effect, the difference of result could perhaps be justified; for, while Section 1 applied whenever an officer was engaged "in the performance of his official duties," Section 2 was limited to assaults "on account of" the performance of official duties, a standard which requires reference to the defendant's purpose. See *Portnoy* v. *United States,* 316 F. 2d 486 (C.A. 1). This anomalous situation was corrected by the 1948 revision of the Code which, in Section 111, combined former Sections 118 and 254, and enacted the statute in its present form. The reviser's notes state that the consolidation was made "with changes in phraseology and substance necessary to effect the consolidation."

Since the statute now punishes assaults on an officer "while engaged in" the performance of his duties, it reflects a Congressional purpose to make the *McNabb* result with respect to killing applicable to assaults on federal officers as well. This is undoubtedly one of the changes in "substance" to which the reviser referred. It is true that after the 1948 revision the Fifth Circuit held otherwise, with respect to assault prosecutions, in *Hargett* v. *United States*, 183 F. 2d 859, 864–865, and in *Hall* v. *United States*, 235 F. 2d 248. However, in its most recent decision on the subject, *Bennett* v. *United States*, 285 F. 2d 567, certiorari denied, 366 U.S. 911, the Fifth Circuit has indicated that it now accepts the view that knowledge of the federal character of an officer is not a necessary element of the offense. Thus, the cases discussed by petitioner are either distinguishable or are consistent with the Second Circuit's result in *Lombardozzi* and in this case, and no conflict among the circuits presently exists.

3. Since the agents were executing a federal warrant valid on its face at the time of the assault, petitioner's conduct was subject to prosecution, even if this Court should ultimately hold the wagering tax statute unconstitutional, a question to be considered in *Costello* v. *United States*, No. 41, this Term. In *Dennis* v. *United States*, 384 U.S. 855, 864–867, this Court held that the unconstitutionality of a statute requiring affidavits would not be a defense to a charge of conspir-

ing to file false affidavits.[4] Still less would a holding that a statute named in a valid warrant was unconstitutional, made over three years after the event, be a justification for an assault on an officer attempting to execute such warrant.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
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SEPTEMBER 1966.

[4] See also the cases cited in *Dennis* v. *United States*, *supra*, at 866.

U.S. GOVERNMENT PRINTING OFFICE: 1966